

Editor's note: appealed - aff'd, (D.Alaska May 8, 1991), aff'd, No. 91-35835 (9th Cir. July 15, 1993), 999 F.2d 1376; cert denied, 115 S.Ct. 92 (Oct. 3, 1994)

UNITED STATES
v.
VIGGO THOR BRANDT-ERICHSEN

IBLA 80-282

Decided March 27, 1980

Appeal from decision of Administrative Law Judge Dean F. Ratzman rejecting application to purchase trade and manufacturing site AA-3111 and cancelling the entry.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Alaska: Trade and Manufacturing Sites

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he used, occupied, and improved the site for trade, manufacture, or other productive industry.

2. Alaska: Trade and Manufacturing Sites

A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the site. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere preparation for a prospective business is not sufficient under the statute.

APPEARANCES: Viggo Thor Brandt-Erichsen, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is taken from a decision dated December 12, 1979, by Administrative Law Judge Dean F. Ratzman, rejecting appellant's application to purchase trade and manufacturing (T&M) site AA-3111, and cancelling the entry.

On August 9, 1968, appellant had filed a notice of location for 80 acres of land in the Chitina Recording District of Alaska for use as a T&M site pursuant to 43 U.S.C. § 687(a) (1976). ^{1/} He stated that he intended to use the land "to generate a lumbering business and operate a hunting lodge." On August 6, 1973, at the conclusion of the 5-year statutory life of the claim, appellant filed an application to purchase the site, indicating that he was using the land for the operation of lodging facilities and a sawmill.

^{1/} 43 U.S.C. § 687(a) (1976) provided:

"Any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or any State or Territory authorized on May 14, 1898, by law to hold lands in the Territories, thereafter in the possession of any occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding 80 acres of such land for any one person, association, or corporation, at \$2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *."

Further, 43 U.S.C. § 687(a)-1 (1976), states in part that "[a]pplication to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the Notice of Claim under this section."

The implementing regulations have fleshed out the specific requirements of proof intended by the statutes. Under 43 CFR 2562.3(d)(1), an applicant must show:

"That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the Act of May 14, 1898 (30 Stat. 413; 43 U.S.C. 687a)" (emphasis supplied).

43 U.S.C. § 687(a) (1976) has been repealed effective October 21, 1986, Federal Land Policy and Management Act of 1976, P.L. 94-579, section 708(a), 90 Stat. 2789, 2790.

On January 18, 1979, the Alaska State Office, Bureau of Land Management issued a complaint charging in substance that appellant was not using the site for the purpose of trade, manufacture, or other productive industry under 43 U.S.C. § 687(a) (1976).

Appellant filed an answer denying the allegations in the complaint and a hearing was held before Administrative Law Judge Ratzman in Anchorage, Alaska, on July 31, 1979.

The Judge's decision sets forth succinctly and accurately the salient facts of the case and the applicable law. A copy of the decision is attached hereto.

Appellant states on appeal that the Judge erroneously found that his access road showed little use and could not support logging traffic. Appellant states that the area is frozen most of the year so that disturbance of the vegetation would not reflect degree of use. Appellant asserts that the Judge ignored continued improvements of the lodge structure, erection of the sawmill, road work, and other activities. He asserts that the Judge ignored profits accruing from barter and trade. Appellant states that he was "founding, promoting, developing, and executing" a business on his site during the prove! up period, that he received income therefrom and that the Judge failed to consider his bona fides.

[1] All of these allegations were duly considered by the Judge and need not be discussed again. Evidence of appellant's activities on the site was too meager to meet the requirements of the T&M Act. The Judge correctly determined that the Government had established a prima facie case of noncompliance with the requirements for trade and manufacturing, and headquarters sites, and that appellant had failed to demonstrate the contrary by a preponderance of the evidence. United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (1979).

[2] Appellant presents no evidence of an ongoing business, either lodging or sawmilling. Although appellant belabors the issue, he effectively concedes in his statement of reasons that his site was at most a preparation for a prospective business. That, however, is not sufficient under the authorities. United States v. Ward, 43 IBLA 333 (1979); United States v. Boyd, *supra*. The record herein is devoid of convincing evidence of a bona fide commercial enterprise, from which appellant could reasonably hope to derive a profit.

Appellant has also alleged that he received discriminatory treatment from BLM officials in that his site was more closely scrutinized than the sites of other T&M applicants. This contention appears to have been made for the first time on appeal, and there are no facts alleged in support of it which, if established would change the result herein.

Having reviewed the record and decision we find the Judge correctly applied the applicable law to the facts of this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

December 12, 1979

United States of America,	:	<u>Contest No. AA! 3111</u>
	:	
Contestant	:	Trade and Manufacturing
	:	Site
v.	:	
	:	
Viggo Thor Brandt-Erichsen,	:	
Contestee	:	

DECISION

Appearances: John M. Allen, Regional Solicitor,
U.S. Department of the Interior,
for the Contestant.

Charles E. Tulin and
Ron Flansburg, Attorneys,
Anchorage, Alaska,
for the Contestee.

Before: Administrative Law Judge Ratzman

The Alaska State Office of the Bureau of Land Management, Department of the Interior, issued a complaint on January 18, 1979, contesting an Alaska Trade and Manufacturing Site purchase application filed by Viggo Thor Brandt-Erichsen, dated August 6, 1973. In the complaint, the following allegations were made:

- a. Section 10 of the Act of May 14, 1898 (30 Stat. 413, as amended, 43 U.S.C. Sec. 687(a) and the regulations issued thereunder, specifically Sec. 2562.3(d)(1), Title 43 Code of Federal Regulations requires that the land be actually used and occupied for the purpose of trade, manufacture, or other productive industry.

The contestee was not actually using and occupying the land for the purpose of trade, manufacture, or other productive industry during the life of the claim or at the time application to purchase was filed on August 6, 1973.

b. Section 10 of the Act of May 14, 1898, supra, and the regulations issued thereunder, specifically Sec. 2562.3(d)(1), Title 43, Code of Federal Regulations, prohibit the acquisition of a site for a prospective business. Contestee is attempting to acquire the land for a prospective sawmill and lodging facility.

c. The settlement laws for public land, specifically the rights to purchase Trade and Manufacturing Sites, require, inter alia, that the prospective purchaser must occupy the land in good faith for the purposes of trade, manufacture or other productive industry. (43 U.S.C. Sec. 687a). Contestee has failed to demonstrate good faith in the occupation of the land for a commercial operation.

The contestee filed an answer on February 28, 1979, denying the allegations in the complaint. A hearing was held in Anchorage, Alaska on July 31, 1979. A Notice of Location filed on August 9, 1968, listed the trade, manufacturing or other industry for which the claim was maintained as a hunting lodge and lumbering business. The 80 acre site is near Rock Creek, north of the Nabesna Road on Milepost 22 in the Chitina Recording District, Third Judicial Division, State of Alaska.

Mr. Stuart Hirsch, a realty specialist with the Bureau of Land Management (BLM), who has examined numerous land entries for compliance with the trade and manufacturing requirements, testified on behalf of the contestant. The end of the prove-up period was August 8, 1973. Tr. 9. A field examination of the T & M site was made by John Tiffany in June of 1974, but no field report was prepared by Tiffany. Mr. Hirsch conducted his field examination on July 14, 1977, and completed his field report on February 7, 1978. Tr. 10. After his examination, Mr. Hirsch recommended that a contest be brought to invalidate the Trade

and Manufacturing Site Application. Tr. 11. A prior Homestead Application by Mr. Brandt-Erichsen on the same lands had been relinquished and a Trade and Manufacturing Site Application filed in its place. Tr. 13.

After meeting Mr. Brandt-Erichsen in Glenallen, Alaska, Mr. Hirsch drove to the site on the Nabesna Road and identified the property corners. A sign advertising the Viking Lodge is 100 yards north of Nabesna Road. Tr. 14, Ex. 1. Mr. Hirsch contended the sign is difficult to see from the road. This sign did not indicate there was any lumber mill or sawmill present. Mr. Hirsch understood that the sign generally was left on the ground to deter passers-by from stopping at the lodge in search of restaurant services. Tr. 16.

The access road was unimproved. It is a clearing in brush and heavy timber. Improvements such as gravel or culverts had not been added, and the only evidence of the road was several wheel tracks on the ground. The ground is primarily on flat ground underlain with permafrost. Tr. 16, Ex. 1. Regular vehicles would have a difficult time using the access road. Tr. 17. Extensive use of the road would create boggy areas which would make it difficult to drive on. On the basis of this observation, Mr. Hirsch determined very little traffic had passed over the road. Tr. 18. The vegetation in the area does not regrow quickly. Therefore, evidence of use would be apparent. An area was cleared and graded making it suitable for small aircraft use.

Several cabins and outhouses are on the site. Ex. 2. Some of the structures were unfinished frame cabins with few signs of use. Tr. 27. Most of them had unfinished interiors. No vegetative disturbance was discovered around four cabins. Since the ground is underlain with permafrost, the mossy vegetation would not grow back rapidly. Unless the use was very minimal, there would be signs of vegetative disturbance that could date back as far as three years. Tr. 20. Although Mr. Hirsch's examination was made almost four years after the prove-up period, he believes he could determine how much use was made of the facilities on the site. Tr. 21. A log cabin that had been constructed within the last three years (number five) was found although there was very little evidence of use. Tr. 25. The main lodge is a sizeable log cabin that is inhabited by the Renda family, the caretakers of the site. Tr. 26.

Mr. Hirsch observed a very well constructed portable sawmill on the site. The carriage was mounted on a frame embedded in concrete. Even though there are trees on the site, there is no commercial timber in the area along Nabesna Road. Tr. 29. The nearest source of commercial timber is 180 miles away. Some tree stumps were observed, but no indication of extensive timber harvesting was found. Mr. Brandt-Erichsen had indicated on a document that he was going to get timber from Canada. Tr. 30.

The lodging business appeared to have been geared to tourists and hunters. Tourist traffic is moderate, but a large number of hunters travel along Nabesna Road. Tr. 31. Total revenue received during the prove-up period was \$210. Tr. 33.

Signs of a sawmill operation other than the portable mill were not found. No trucks that could haul timber were observed. The access road was in no condition to support use by log-laden trucks. Records of the type that would be kept by an ongoing business concern were not submitted by the claimant. Tr. 34. Advertising for the Viking Lodge was restricted to person to person conversations and some printed brochures. No newspaper or magazine advertisements were placed. Tr. 36. One business license had been obtained ten weeks before expiration of the prove-up period. Mr. Hirsch concluded that no business had been established by the end of the prove-up period. Tr. 36. In his opinion the steps taken by Mr. Brandt-Erichsen were for the purpose of conducting a business at some later date. Tr. 36.

Mr. Tim Bertrand, who operates an air taxi business five miles east of the site was not under the impression that there was a business at the contested site. Tr. 38. Mr. Hirsch concluded that efforts to develop the site during the prove-up period were very minimal. Tr. 40. He also believes the lodge building was constructed when the land was subject to the homestead entry, and that the only work performed to perfect a business on the site was improvement of the air strip and installation of the outlying rustic cabins. Tr. 40.

Viggo Thor Brandt-Erichsen, the applicant, testified he has been a resident of Alaska since July 3, 1962. He established Viking Lodge with the idea of preserving an Alaskan

wilderness atmosphere. Tr. 58. He mailed and passed out brochures about Viking Lodge to people who wished to experience the Alaskan wilderness. Tr. 59. Mt. Sandford and the Mentasta Mountains can be seen from the lodge. Tr. 64. When constructing the lodge, Mr. Brandt-Erichsen held disturbance of the natural vegetation to a minimum. Tr. 66. The lodge is located near an active game trail. An 855-foot long airstrip was also cleared on the site. The sawmill was placed on the site in 1966.

Construction of cabins began in 1972. Tr. 68. Five cabins and two outhouses were built on the site during the prove-up period. The main lodge is a log structure, and the smaller cabins are frame. Some were built by Mr. Brandt-Erichsen. An arrangement was worked out under which other individuals would build the cabins and they would be leased back to the persons who built them at a rate of \$50 a year. Cash payments were not required until the cost of materials and labor were amortized. Mr. Brandt-Erichsen asserts the value of the cabins was income. Tr. 71. Capital improvements were \$8,360 over the five year prove-up period. Tr. 72. This figure included outlays for the lodge, two outhouses, two cabins, the sawmill, air strip and road work, surveying and minor items. According to Mr. Brandt-Erichsen, an income of \$3,190 was generated. Tr. 73. The airstrip on the property has not been completed due to the permafrost, but the applicant intends to complete it.

The applicant disagreed with Mr. Hirsch's field report concerning indications of use of the cabins and the surrounding land. In particular, Mr. Brandt-Erichsen gave a reason for the absence of visible footpaths near the rental cabins. He stated that he had instructed people "not to walk in the same place every time they go up and down the hill." He further asserted that guests seldom use one of the outhouses as he did not keep toilet paper there because squirrels take it for nesting. The guests normally use the outhouse near the lodge. There is year round access to the property by four-wheel drive. In any event, it is just a short walk from the highway. Tr. 79.

Advertising for the lodge consists of a brochure, person to person statements and signs on the property. Mr. Brandt-Erichsen has been on the property a total of about 150 days during the prove-up period. Tr. 82.

On cross-examination, Mr. Brandt-Erichsen acknowledged that he received about \$300 in cash receipts from the operation of the lodge and sawmill. Although he testified that he received \$3,190 over the five year prove-up period, most of it, he contended, was in the form of building materials and labor performed by others in exchange for the use of the cabins. Tr. 87. He did not report this \$3,190 as income in his tax returns for those years. Tr. 87. In his 1973 tax return, he reported an income of \$210 from the site (for leasing three cabins). A 1973 Alaska State Business License in the name of V. Thor Brandt-Erichsen, listed the business as one involving "real estate including rentals."

Mr. Brandt-Erichsen insists that land was not rented to the cabin builders. He transported the materials used to construct the cabins, and provided a site and a scenic view. Tr. 91. In exchange for the labor and materials expended in constructing the cabins, Mr. Brandt-Erichsen gave the participants a privilege to enter and use the dwelling as much as they chose to during the periods established in leases. Since the site is in the Alaska wilderness near prime hunting locations, it is ideally suited for recreational use. Tr. 92. Mr. Brandt-Erichsen believes he has complied with the Trade and Manufacturing laws and regulations. Tr. 93.

Providing further details as to the exchange of use for the cost of construction of the cabins, Mr. Brandt-Erichsen explained:

Q. I'm talking about before they built those cabins, what were they getting?

A. Before they built the cabins, they had a truck full of building materials and a desire to build a structure. They didn't have anything.

Q. It was their building materials and it would be their labor that would go into the structure?

A. That's right.

Q. What were they getting from you at that point?

A. They got transportation for the materials.

Q. And the space to build it on?

A. And I showed them where they could build if they wanted to build there, and they went ahead and did it. When the building was finished, it became my property.

The applicant indicated that the "bookkeeping" for the T & M Site is the material in the structures which have been built. Tr. 99. He did not obtain business licenses in the first four years of the prove-up period because he believed he did not need one if the business did not gross \$1,500 a year. Tr. 97. The homestead entry originally filed on the property was abandoned after Mr. Brandt-Erichsen decided not to live full time on the site. Tr. 100

A letter from R. E. Strause, dated July 11, 1973, submitted with the T & M Site purchase application, stated that a large cabin was in the process of being built. Also, a large lodge was to be constructed in the future. When asked about the substance of this letter, Mr. Brandt-Erichsen contended one large structure had been built but it needed insulation and an additional layer of roofing. Tr. 104.

The caretaker, Mr. Renda, moved onto the site in October 1972, with his family. Tr. 108. During the time Mr. Renda occupied the lodge, the lodge was still available to accommodate guests. Tr. 109.

Mr. Brandt-Erichsen received \$125 for timber sold from his sawmill operation. No business license has been obtained for that operation. The nearby source of available timber has been included in a land withdrawal and is no longer available. However, the applicant stated that timber from Watson Lake in British Columbia, Canada can be brought in by trailer truck. Tr. 114. The timber he sold for \$125 was from the T & M Site. Of the total \$210 in revenue for 1973 from that site, \$125 of it was for timber. Tr. 116. The sawmill equipment was also used for materials required in the construction of the cabins. Costs incurred to construct the rustic cabins ranged from \$500 to \$740 each. Tr. 122.

Joe Harrington testified he stayed at the Viking Lodge and also helped in building some of the cabins. Tr. 129. Lawrence C. Marcuson stated he stayed two nights at the Viking Lodge in 1969 and paid \$4 in rent. Tr. 135. Nancy Brandt-Erichsen, who assisted in developing Viking Lodge, explained that a small number of cabins were spread apart to maintain the concept of a wilderness location. Tr. 138. Rose M. Renda and her husband agreed to take care of the site in exchange for use of the lodge. Tr. 145. The Rendas have resided at Viking Lodge for the last six years. Tr. 147. Millard Heatwole has stayed several nights at Viking Lodge in 1971. Tr. 155. Donald Dahl used the lodge in 1968. He built one of the cabins there. He paid about \$600 for materials used in construction of the cabin, and he and his children built it. However, he did not consider it to be his cabin. Tr. 160.

A Field Report prepared by Stuart Hirsch listed the following improvements on the site:

- 1 16' x 24' log and frame building
- 4 frame cabins: 8' x 12', 11' x 14', 10' x 12',
and 8' x 12'
- 2 outhouses: one log construction and one frame
construction
- 1 nearly complete log cabin approximately
8' x 10'
- 1 caretaker cabin under construction
- 1 sawmill
- 1 airstrip
- Access and interior roads approximately one mile
in length
- 1 advertising sign and mail box

Applicable Law

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the site for trade, manufacture, or other productive industry. United States v. Graham Keith Ward, 43 IBLA 333 (1979); United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (1979). The Department has interpreted the T & M Site law to require an applicant to show at the time of the filing of his application to purchase that he is presently occupying

land for business purposes, that the land contains improvements and that it is presently needed for conduct of the existing business. It is clear that a site for a prospective business cannot be acquired under the T & M Site law. 43 CFR 2562.3(d)(1). United States v. Jerry L. Crow, 28 IBLA 345 (1977). Preparation for a prospective business is not sufficient under the regulations. United States v. Boyd, *supra* at 331.

An applicant wishing to purchase a tract must submit evidence from which it can be concluded that he was engaged in actual business operations from which he reasonably hoped to derive a profit. This does not mean that a modest operation or even an unprofitable one would necessarily fail to qualify, but there should be evidence of activity of such a nature that a reasonable return could be expected. United States v. Ronald B. Tippetts, 29 IBLA 348 (1977); United States v. Boyd, 39 IBLA 321 (1979).

Where the evidence shows that as of the final day of the 5-year statutory period for proving up a T & M Site a claimant's business on the site was only prospectively viable, the concept of substantial compliance may not properly be invoked to bring the claimant within the bounds of the legal requirements for proving up such a site. United States v. Barbara Jean Hill, 33 IBLA 395, 400 (1978). The receipt of a few dollars over a period of years does not satisfy the T & M Site requirements. Hershel E. Crutchfield, A-30876 (1968); United States v. Jerry L. Crow, 28 IBLA 345, 349 (1977). Rejection of an application to purchase a Trade and Manufacturing Site is proper where the evidence shows that the tract was used as a wilderness camp area, and that nominal revenues were derived from camping tourists during the life of the claim. United States v. Ronald B. Tippetts, 29 IBLA 348, 353 (1977).

The business established on a Trade and Manufacturing Site may not consist of a sale or rental of the land itself. Seldon H. Klinke, 7 IBLA 83 (1972).

Determination

A review of the facts indicates that scant rental use of the T & M entry was made during the prove-up period. Total cash revenue collected by Mr. Brandt-Erichsen amounted to \$210 for the entire prove-up period. Of this total, \$125 was received for timber removed from the site. Consequently, only \$85 was received for the rental of the lodge and cabins. Such nominal amounts would not lead one to the belief that renting cabins or operating a sawmill might be profitable ventures.

A review of the photos of several of the cabins on the claim and of the BLM Field Report shows that several of the rustic cabins did not reach a stage of completion that would attract prospective renters. A timely and coordinated plan to develop a cabin rental business was lacking. There is no available timber near the T & M Site that could be processed in the sawmill operation. Evidence to establish the existence of an available market for logs was not introduced.

Including the value of the cabins in the total income generated from the rental operation would run counter to the intention of the Trade and Manufacturing Site legislation. Although the value of the cabins could be considered a benefit or gain to Mr. Brandt-Erichsen in the broadest sense, the underlying arrangements were tied to the desirability of the Federal lands, not to the applicant's trade, manufacturing activity or productive industry.

In a sense the cabins, upon completion, were presented as gifts to Mr. Brandt-Erichsen (it is recognized that the builders retained the right to use them from time to time). At the same time the builders were using hammer and saw to erect the cabins they were divesting themselves of any claim of ownership to the finished product. These unique oral arrangements were advantageous to the applicant, but do not add up to a business. I find Mr. Brandt-Erichsen's effort to include the value of the cabins a novel and imaginative approach to the problem of sustaining his entry. However, cabin arrangements did not produce revenues or gain of the required type.

Accordingly, the Government has sustained the charges set forth in Paragraphs 5a and 5b of the complaint. There appears to be no requirement to issue a ruling on the question of good faith occupation of the land. The application to purchase the Trade and Manufacturing Site is rejected, and the entry cancelled.

Dean F. Ratzman
Administrative Law Judge

Distribution and Appeal Information Attached.

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear below.

Enclosure: Additional information concerning appeals.

Distribution:

Regional Solicitor, U.S. Dept. of the Interior, 510 L Street,
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Standard Distribution

